IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1593

JOSEPH EDWIN HINCHMAN,
Petitioner,

v.

THE PEOPLE OF THE STATE OF COLORADO
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

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April 16, 1979

INDEX

TABLE OF AUTHORITIES

Case Citations

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- - -

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Petitioner, JOSEPH EDWIN HINCHMAN, by and through his attorneys, JOE CLARENCE MEDINA and CHARLES F. MURRAY, prays that a writ of certiorari issue to review the opinion and judgment rendered against him by the Supreme Court of the State of Colorado.

CITATION TO OPINIONS BELOW

The opinion of the Colorado Supreme Court is not yet reported in the official Colorado Reports, but is reported in the advance sheets as follows: People v. Hinchman, ____ Colo. ____, 589 P.2d 917 (1978). A copy of the published opinion is appended as Appendix "A". The order of the Colorado Supreme Court denying the Petition for Rehearing was issued January 8, 1979, and is appended as Appendix "B".

The earlier opinion of the Colorado Court of Appeals is reported in 40 Colo. App. 9, 574 P.2d 866 (1977). Its published opinion is appended as Appendix "C".

JURISDICTION

The opinion of the Colorado Supreme Court was rendered December 11, 1978, and a petition for rehearing was denied January 8, 1979. On April 6, 1979, petitioner's application for extension of time to and including April 19, 1979, to file his petition for writ of certiorari was granted by Mr. Justice White. The jurisdiction of this court is invoked pursuant to 28 USC § 1257(3).

QUESTIONS PRESENTED

I

ONCE A SEARCH WARRANT HAS BEEN EXECUTED BY A SEARCH OF THE INCIDENT PREMISES AND THE RETURN AND INVENTORY THEREOF MADE AND FILED, MAY THE POLICE AUTHORITY RE-ENTER AND CONDUCT A SECOND SEARCH AT A LATER DATE WITHOUT ADDITIONAL WARRANT? MOREOVER, DOES THE POLICE OFFICERS' ACT OF HANDLING AND TAPE-SEALING THE NOZZLE OF A GASOLINE CONTAINER DURING SUCH SECOND SEARCH CONSTITUTE A "SEIZURE" WITHIN THE MEANING OF THE FOURTH AMENDMENT?

II

WHETHER THE COURT'S LIMITING OF PETITIONER'S CROSS-EXAMINATION OF THE CHIEF PROSECUTION WITNESS, BASED ON THE STATE'S ASSERTED INTEREST IN PRESERVING THE CONFIDENTIALITY ATTENDANT TO JUVENILE DELINQUENCY PROCEEDINGS, DEPRIVED PETITIONER OF A MEANINGFUL CONFRONTATION OF THE WITNESSES AGAINST HIM IN CONTRAVENTION OF HIS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS?

III

WHETHER THE STATE'S REQUEST THAT AN ASSERTED ERRONEOUS SENTENCE IMPOSED AGAINST PETITIONER BY THE TRIAL COURT BE ORDERED NULLIFIED AND A GREATER SENTENCE IMPOSED, WHEN SUCH REQUEST WAS MADE ONLY AFTER PETITIONER HAD PERFECTED HIS APPEAL, CONSTITUTES SUCH INTERFERENCE WITH PETITIONER'S RIGHT OF APPEAL AS TO

DEPRIVE HIM OF HIS RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT?

CONSTITUTIONAL AND STATUATORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES AMENDMENT IV

The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE II, SECTION 7, COLORADO CONSTITUTION

The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place or seize any person or things shall issue without describing the place to be searched, or the person or thing to be seized, as near as may be, nor without probable cause, supported by oath or affirmation reduced to writing.

RULE 41(d)(5)(V), COLORADO RULES OF CRIMINAL PROCEDURE

A search warrant shall be executed within ten days after its date. The officer taking property under the warrant shall give the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and

shall be accompanied by a written inventory of any property taken...

RULE 41(e), COLORADO RULES OF CRIMINAL PROCEDURE

A person aggrieved by an unlawful search and seizure may move the district court for the county where the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that:

(1) The property was illegally seized without warrant; or...

The judge shall receive evidence on any issue of fact necessary to the decision of the motion...The motion shall be made before trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial.

CONSTITUTION OF THE UNITED STATES AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him;...

ARTICLE II, SECTION 16, COLORADO CONSTITUTION

In criminal prosecutions the accused shall have the right...to meet the witnesses against him face to face;...

SECTION 19-1-109, COLORADO REVISED STATUTES, 1973 AS AMENDED. EFFECT OF PROCEEDINGS

(1) No adjudication or disposition in proceedings under section 19-1-104 shall impose any civil disability

upon a child or disqualify him from any state personnel system or military application or appointment or from holding public office.

(2) No Adjudication, disposition, or evidence given in proceedings brought under section 19-1-104 shall be admissible against a child in any criminal or other proceeding, except in subsequent proceedings under section 19-1-104 concerning the same child.

SECTION 19-1-104(1)(a) and (4)(a) and (b), COLORADO REVISED STATUTES, 1973 AS AMENDED JURISDICTION (text is set forth as Appendix "D" due to length.)

CONSTITUTION OF THE UNITED STATES AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 18-4-102, COLORADO REVISED STATUTES, 1973 AS AMENDED FIRST DEGREE ARSON

(1) A person who intentionally sets fire to, burns, causes to be burned, or by the use of any explosive damages or destroys, or causes to be damaged or destroyed, any building or occupied structure of another without his consent, commits first degree arson.

(2) First degree arson is a Class 3 felony.

SECTION 16-11-304(1), COLORADO REVISED STATUTES, 1973 AS AMENDED.

When a person has been convicted of a ...Class 3 felony, the court imposing the sentence...shall establish a maximum and minimum term for which said convict may be imprisoned. The maximum term shall not be longer than the longest term fixed by law for the punishment of the offense of which he was convicted, and the minimum term shall not be less than the shortest term fixed by law for the punishment of the offense of which he was convicted.

STATEMENT OF THE CASE

a. Introduction

Petitioner was convicted of the criminal offenses of first degree arson and conspiracy to commit arson. On his appeals to the Colorado Court of Appeals and the Colorado Supreme Court, petitioner relied on two principal grounds of error, namely: (1) the trial court's denial of his motion to suppress evidence concerning a certain gasoline container and expert testimony relating to fumes and vapors trapped in the container by act of the police authorities during a warrantless, illegal search of his residence premises, all as being violative of his rights under the Fourth and Fourteenth Amendments; and (2) the trial court's undue limitation of his cross-examination of the chief prosecution witness against him as being violative of his right of confrontation under the Sixth and Fourteenth Amendments.

In affirming the conviction, the Colorado Supreme Court, by split decision, held that the police authorities' act of handling the gasoline container and

tape-sealing of the nozzle thereof to prevent fumes and vapors therein from escaping was an act "to preserve potentially relevant evidence" but did not constitute a "seizure" within the meaning of the Fourth Amendment. The same divided court additionally upheld the trial court's limiting of the cross-examination of the chief prosecution witness as being within the scope of the trial court's discretion and not violative of the petitioner's right of confrontation. The Colorado Supreme Court additionally upheld the state's contention, raised only after petitioner had perfected his appeal, that the sentence imposed upon petitioner by the trial court was illegally low, and remanded the case to trial court for resentencing.

b. General facts of the case

On March 2, 1975, the office of Russell Gummin, an attorney at Lakewood, Colorado, was damaged by an incendiary fire. The following day, Bobby Abrahamson, Jr., who was a neighbor of petitioner and was then of the age of seventeen years, was incarcerated as an incident to a sencence received by him in a matter involving a felony murder which had occurred approximately four months before the fire. Sometime before the fire young Mr. Abrahamson entered into a plea bargain, with the same prosecuting attorney who prosecuted the instant matter, by which in exchange for his testimony implicating his accomplices in the murder, he was prosecuted as a juvenile delinquent rather than as a criminal offender for his role as as accessory to the murder. The plea bargain in the murder case was fully consummated three weeks before the fire when young Abrahamson was formally granted immunity from any further prosecution in the murder case and he then did testify against his accomplices in the murder case.

After his incarceration on March 3, 1975, and until March 20, 1975, young Abrahamson maintained his innocence concerning the arson. Twice while he was incarcerated during that period, Abrahamson was visited by the estranged wife of petitioner. Mrs. Hinchman, who was then an employee of Russell Gummin, specifically inquired of young Abrahamson as to whether her husband had anything to do with setting the fire. Both times Mr. Abrahamson told Mrs. Hinchman that he had no knowledge regarding the fire. The police authorities, Agent Cline of the Lakewood Department of Public Safety and Chief Hunter, Chief Arson Investigator for the Lakewood Fire Department, also visited with young Abrahamson while he was incarcerated during that period, and advised him to the effect that if petitioner had anything to do with the fire he should implicate him so they could "put him away as he was a threat to society". Mr. Abrahamson again denied any knowledge relating to the fire. On March 19th, the witness Abrahamson was again visited by Agent Cline and Chief Hunter, this time accompanied by the deputy district attorney, who advised young Abrahamson to the effect that if he would cooperate in the investigation they would assure him that the arson charge against him would be reduced to a lesser charge and they would see to it that any sentence he might receive would be a sentence to the state reformatory to be served concurrently with the sentence he had just received as a juvenile offender in the murder case. The next day, March 20, 1975, Abrahamson gave his statement admitting that he had set the fire and further stating to the effect that the petitioner had hired him to set the fire for the sum of $200.00. Young Abrahamson so also testified at the trial. In his statement of March 20, 1975, also testified

to at the trial, Abrahamson stated that before setting the fire he had gone to petitioner's garage where he procured the gasoline container which he utilized to carry the gasoline which he used to set the fire, and further stated that after setting the fire he returned the gasoline can to the petitioner's garage.

c. Facts related to search and seizure issue

On March 20, 1975, as a result of Abrahamson's statement, the police authorities arrested the petitioner and procured a search warrant to search his home and garage for a "red gasoline can--5 gallon capacity". The search pursuant to the search warrant was conducted the evening of March 20th, and the incident Return and Inventory of the items seized, which itemized several gasoline cans and other paraphernalia was then made and filed. The item at issue in this petition, being the "2-½ gallon red and yellow gasoline can" which was identified and received in evidence at the trial as People's Exhibit "T", was not itemized nor described in either the search warrant nor the incident Return and Inventory. Chief Hunter, who conducted the seach on March 20th, testified to the effect that he saw the said gasoline can in petitioner's garage during the search, but unwittingly forgot to take it with him. Mrs. Hinchman, however, testified that she went to the family home the morning of March 21st looking for the gasoline can and she was positive that there were no gasoline containers in the garage on that morning. She further testified that she was surprised to find it later when she retrieved and turned it over to Agent Cline and Chief Hunter on March 24th. Photographs taken by the police authorities during the course of the search, admitted at the trial, likewise do not verify the existence of the

subject gasoline can at the time of the search.

The day following the search pursuant to the search warrant, that is, March 21st, while petitioner was still in custody and the family home vacant, Chief Hunter and Agent Cline returned to the petitioner's premises for the stated purpose of tape-sealing the nozzle of the subject gasoline can so as to prevent any gasoline fumes or vapors therein from escaping. The said authorities testified that though they thus handled and tape-sealed the nozzle of the gasoline can during the second intrusion on March 21st, they deliberately chose not to take the can with them. Chief Hunter and Agent Cline candidly testified that they had no search warrant relating to their second entry into the Hinchman residence on March 21st, although they had conferred with the District Attorney's office prior to returning to the home of petitioner the second time. Thereafter, the same police authorities, by their own testimony, persuaded Mrs. Hinchman to retreive and deliver to them the gasoline can from the garage of the petitioner's residence, which she did on March 24, 1975.

Although a detailed pre-trial discovery motion had been filed by petioner and granted by the Court, and although counsel for petitioner had interviewed both Agent Cline and Chief Hunter prior to the trial, and although defense counsel were aware that it was Mrs. Hinchman who had delivered the gasoline can to the police authorities of her own accord and without police persuasion according to her testimony, petitioner and his counsel were never aware untilChief Hunter's cross-examination testimony at the trial, that the police authorities had thus intruded the home of the petitioner and tape-sealed the nozzle of the gasoline container the day after their search pursuant

to the search warrant. Immediately upon such testimony having been elicited from Chief Hunter, counsel for petitioner orally moved the trial court to suppress any evidence pertaining to the gasoline can in question and coupled with it a motion for mistrial. The trial court thereupon conducted an in-camera hearing of the motion to suppress, however, after hearing all the evidence relating to the motion, the trial court declined to rule on the merits of the motion and instead held that petitioner's motion to suppress was not timely and could have been asserted before trial for the reason that counsel for petitioner had been aware that Mrs. Hinchman had delivered the gasoline can to the authorities. (A transcript of the trial court's ruling on petitioner's motion to suppress is set forth under Argument I c. infra.) Expert testimony was subsequently adduced by the prosecution at the trial, to the effect that the fumes and vapors from the gasoline container were similar to and correlated with fumes and vapors found at the scene of the fire.

d. Facts related to issue concerning Right of Confrontation

The second error asserted by petitioner relates to the trial court's curtailment of his cross-examination of the chief prosecution witness, Bobby Abrahamson, Jr. Petitioner's counsel cross-examined Mr. Abrahamson extensively concerning the nature of the plea bargain and the benefits thereof which he received in exchange for his testimony implicating the petitioner. Defense counsel likewise sought to cross-examine Mr. Abrahamson concerning the nature of the plea bargain and the benefits thereof which he had theretofore recently received from the same prosecuting attorney in exchange for his testimony

implicating his accomplices in the prior unrelated murder prosecution. However, before any testimony was taken from the witness, the prosecuting attorney moved the court for a protective order preventing defense counsel from cross-examining the witness on matters related to the witness' plea bargain in the murder case. The trial court upheld the prosecution's contention that, since Mr. Abrahamson had been adjudicated as a juvenile offender in the homicide prosecution, such cross-examination would have the effect of contravening a provision in the Colorado Children's Code which provides to the effect that matters arising in juvenile delinquency proceedings are confidential and not admissible in collateral proceedings. The trial court, therefore, limited defense counsel's cross-examination on that issue to the asking of the bare question whether sometime in the past "he (the witness) had been in trouble with the law and, if on that previous occasion, without identifying what the offense was or that it was a juvenile offense, he received favorable treatment in exchange for his agreement to testify against others" (f. 1083). Upon seeking further clarification of its ruling from the Court, defense counsel was specifically advised as follows (see ff. 1099-1100):

> "MR. MEDINA: 'Just one point of clarification, your honor, so that we didn't--as I uderstand the ruling of the court, with respect to the limitation of cross-examination to the previous incident. The court wants me to stay in the general matter without going into any specific details, as I understand, of the offense or alleged offenses or the result. Am I permitted to go into dates and time or is it that--maybe I would be getting too far into it, I am not sure.'

THE COURT: 'I think that it should be limited just to the fact that there was some previous trouble with the law and that he got more favorable treatment by virtue of his agreement to testify against others. And I don't think we should pin it down any more definite than that'."

e. Manner in which the federal questions were raised and preserved

Subsequent to the jury's verdict and within applicable time limits petitioner reiterated the constitutional issues of the claimed illegal search and seizure and denial of meaningful confrontation of the witness in his motion for new trial. The trial court having denied petitioner's motion for new trial, the same issues were raised on his appeal to the Colorado Court of Appeals and his subsequent petition to the Colorado Supreme Court for writ of certiorari. The same issues were again raised by petitioner in his petition for rehearing after the Colorado Supreme Court had rendered its decision.

f. Facts relating to interference with right of appeal

Following his conviction, the trial court sentenced petitioner to serve a term in the state penitentiary for not less than five nor more than six years on the first degree arson count, however, the trial court suspended three years off of both the minimum and maximum term thus imposed. The actual sentence imposed, therefore, resulted in an effective term of actual incarceration of not less than two nor more than three years. The state never contested the partial suspension of the sentence at the trial court level. Nor did the state file a cross-appeal of the matter as it could have done pursuant to Colorado law. However, after

petitioner had perfected his appeal to the Colorado Court of Appeals, the state in its Answer Brief filed in the Colorado Court of Appeals, for the first time raised the issue that the sentence imposed upon petitioner was "illegally low".The Colorado Court of Appeals, by a two to one split decision, reasoned that the "state's failure to file a cross appeal" and that "...judicial standards of fairness reaching constitutional proportions do not permit procedures which effectively deter a defendant from exercising his rights of appeal..." and declined to consider the matter of the asserted illegally low sentence. On the state's petition for certiorari filed with the Colorado Supreme Court seeking review of the Colorado Court of Appeals' decision regarding the claimed erroneous sentence, being Case No. C-1409 before the Colorado Supreme Court and which was consolidated with Case No. C-1414, being the cause relating to petitioner's petition for certiorari in that court, the Colorado Supreme Court reasoned that the trial court was without jurisdiction to effectively impose a sentence inconsistent with the minimum and maximum terms specified by statute. It held, therefore, that the trial court's suspension of a part of the sentence imposed on petitioner was void.

REASONS FOR GRANTING WRIT

Petitioner first contends that his conviction is tainted by the fruit of an illegal search of his residence premises and the seizure which resulted when police authorities tape-sealed the nozzle of a gasoline container to prevent fumes and vapors therein from escaping. Petitioner asserts that the gasoline container and expert testimony relating to the fumes and vapors therein as being similar to and correlating

with fumes and vapors found at the scene of the fire, ought to have been suppressed as evidence in the case as being the product of an illegal search and seizure in contravention of his rights under the Fourth and Fourteenth Amendments.

Petitioner secondly contends that his conviction is also tainted by a violation of his right to confront the witnesses against him afforded him under the principles of the Sixth and Fourteenth Amendments. Petitioner asserts that such violation resulted from the trial court's undue limitation of his cross-examination of the chief prosecution witness, Bobby Abrahamson, Jr. Petitioner further contends that the courts below have effectively disregarded the previous pronouncements of this Court in the case of *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105 , 39 L.Ed.2d 347 (1974), by their ommission to give import or meaning to this Court's pronouncement that an accused's Right of Confrontation is paramount to any interest of the state in preserving the confidentiality attendant to juvenile delinquency proceedings.

Petitioner finally contends that the decision of the Colorado Supreme Court, allowing the claimed error in sentence to be asserted by the state only after petitioner had perfected his appeal, with the result that petitioner is thereby subjected to a greater penalty than that originally imposed, has a chilling effect on his right of appeal and is, therefore, violative of the principles of fairness guaranteed to him by the due process clause of the Fourteenth Amendment.

ARGUMENTS

I

ONCE A SEARCH WARRANT HAS BEEN EXECUTED BY A SEARCH OF THE INCIDENT PREMISES, THE POLICE AUTHORITY IS NOT AT

LIBERTY TO RE-ENTER AND CONDUCT A SECOND SEARCH OF THE PREMISES AT A LATER DATE WITHOUT ADDITIONAL WARRANT. MOREOVER, THE ACT OF HANDLING AND TAPE-SEALING THE NOZZLE OF A GASOLINE CAN TO PRESERVE FUMES AND VAPORS THEREIN DURING SUCH SECOND SEARCH CONSTITUTES A "SEIZURE" WITHIN THE MEANING OF THE FOURTH AMENDMENT.

a. The Search

Research of decisions of this court reveal that the issue as to whether a police officer may return to the searched premises, without further warrant after a search incident to a search warrant has been completed and the incident Return and Inventory has been made and filed, has never been decided by the Court. The issue has apparently not been presented often in the lower courts, but in the few cases where the issue has been decided, the courts are in agreement that a second search based on the same warrant constitutes an unreasonable search. *State v. Pina*, 94 Ariz. 243, 383 P.2d 167 (1963); *McDonald v. State*, 195 Tenn. 282, 259 S.W.2d 524 (1953). The reasoning supporting the rule, as stated in *McDonald v. State, supra*, at 259 S.W.2d 525, is as follows:

> "In this state a search warrant may be executed and returned at any time within five days after its date...If for no other reason than the officer still has it in his possession, *a search warrant once served, but not returned can be used a second time within five days for the purpose of a second search of the premises described, then, logically it would seem to follow that such officer, with his squad of assistants, may use it to make an indefinite number*

of such searches during that five days. Thus the warrant could become a means of tyrannical oppression in the hands of the unscrupulous officer to the disturbance or destruction of the peaceful enjoyment of the house or workshop of him or her against whom the efforts of such officer are directed. On principle, therefore, such second search seems to come within the prohibition of the unreasonable search and seizure clause of our constitution..." (emphasis added).

The majority opinion of the Colorado Supreme Court sanctions the second intrusion into petitioner's residence without further warrant one day following the execution of the search warrant. The court characterizes the second intrusion as an "entry", but does not address the fundamental issue whether the second entry constituted a valid search of the petitioner's residence premises. A search occurs when there is an official intrusion into an area where an individual has a reasonable expectation of privacy. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Petitioner's place of residence was such an area and was entitled to the utmost protection under the principles of the Fourth Amendment. the second intrusion into petitioner's home by Chief Hunter and Agent Cline was admittedly and clearly without warrant, and was, therefore, an invalid search under the circumstances of the case. The fire had occurred March 2, 1975; the same officers conducted a valid search pursuant to a valid search warrant on March 20, 1975, however, the search warrant was executed and the search completed on the same day, and the incident Return and Inventory was made and executed the same day, March 20th. The return of the

officers to the home of petitioner on the evening of the following day, March 21st, was without warrant, when presumably a second search warrant could have been procured by them. The second intrusion constituted an invalid search of petitioner's home.

b. The Seizure

The question of a seizure in this case presents a novel and imposing issue, namely, when and how is a seizure effected within the meaning of the Fourth Amendment? The majority opinion of the Colorado Supreme Court finds that "no evidence was seized during the officers' second entry". The Court then holds that the police officers' act of handling and tape-sealing the nozzle of the gasoline can during the second search to prevent fumes and vapors therein from escaping, without taking the can with them upon leaving the premises, constituted an act simply "to preserve potentially relevant evidence" but did not constitute a seizure. This conclusion, it is felt, does violence to the principles and purposes of the Fourth Amendment. As pointed out by Mr. Justice Erickson in his dissenting opinion, "a trespass to preserve evidence is indistinguishable from a seizure for the purposes of the Fourth Amendment". if the law requires an asportation of an item to constitute its seizure, it is felt that such an asportation occurred in this case when the officers handled the gasoline can to effect its tape-sealing. However, regardless of any question of asporation, in point of law this Court has previously established a guiding principal, namely that intangibles, such as mere words in a conversation, are a proper subject of the law of search and seizure protected by the Fourth Amendment. See *e.g., Berger v. New York*, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967);

Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). If mere words, "captured" in an illegal eavesdropping by electronically recording a conversation are a proper subject for motion to suppress evidence which is violative of the Fourth Amendment, as in *Berger v. New York, supra*, clearly the "capturing" of gas fumes and vapors by tape-sealing of a nozzle of a gasoline can with a purpose "to preserve potentially relevant evidence" constitute a seizure subject to the protections of the Fourth Amendment.

Following the trapping of the fumes and vapors in the gasoline can by the police officials' act of tape-sealing the nozzle of the container on March 21st, on March 24, 1975, the petitioner's then estranged wife, at the prompting of the same police officers delivered the gasoline can to them. Agent Cline thereafter submitted the container for testing by a chemist at the Crime Laboratory of the Colorado Bureau of Investigation, and the result of such testing was the subject of expert testimony adduced by the prosecution at the trial. The prosecution's expert testified to the effect that a gas-chromatograph evaluation of the fumes and vapors in the gasoline can were similar to fumes and vapors which were found on carpeting at the scene of the fire. It is submitted that the results of such testimony of the fumes and vapors in the gasoline can were the fruit of an illegal search and seizure, and, therefore, ought to have been suppressed and excluded as evidence. See *e.g. Alderman v. United States*, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969); *Wong Sun v. United States, supra.*

c. The Motion to Suppress

The majority opinion of the Colorado Supreme Court misconceived and misapprehended the law and

the facts relating to the timeliness of petitioner's motion to suppress. The record reveals that immediately upon defense counsel's learning during the trial that the second and warrantless search of March 21, 1975 had occurred, petitioner interposed his oral motions to suppress the gasoline can and for mistrial (ff.547-550). However, the trial judge declined to exclude the gasoline can or any testimony concerning it because the motion to suppress had not been filed prior to the trial. In denying the motion to suppress, the trial judge at ff. 597-601 stated as follows: follows:

> "All right, the Court is going to deny the motion to suppress the evidence. The court is going to deny it on the basis of Rule 41(e)(5). The court finds the following to be facts concerning this motion to suppress: the motion to suppress was not filed until the trial was already in progress. the court finds from the statements of counsel made to this court in the course of this argument that counsel was aware that the evidence was going to be that the can in question was not obtained at the time of the search of the premises pursuant to the search warrant, but was obtained by Mrs. Hinchman and turned over by her to the police and fire authorities.
>
> The Court is of the opinion that the portion of the rule that says the motion to suppress evidence may also be made before trial, unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion. But the court in its discretion may entertain the motion at the trial. I asked for hearing on this motion to determine what the facts were in order to determine how to exercise my discretion concerning whether this motion should have been heard at the trial. It's

my opinion that this is a motion which should have been brought up. Counsel knew that Mrs. Hinchman was the one who took this can from the garage and gave it to the police and fire authorities. If they intended to suppress that for any reason, the way to raise the issue is to file a motion before trial. So, the motion to suppress will be denied because it was not filed pursuant to the rule and the Court exercises its discretion that it will not allow the filing of motion to suppress in the middle of the trial.

Since the motion to suppress is denied, the motion for mistrial will also be denied."

The Colorado Supreme Court's upholding of the trial court's determination that defendant's motion to suppress was not timely, effectively sanctions and encourages the filing of baseless and groundless motions to suppress evidence. The trial record clearly demonstrates that until the testimony of Chief Hunter was presented at the trial, petitioner and his counsel were totally unaware that the police officers had returned to and intruded the home of petitioner the second time, on March 21st. True, defense counsel had been aware that petitioner's wife had physically delivered the gasoline can to the officers, however, since Mrs. Hinchman had a proprietary interest in the premises, petitioner was totally without basis for filing of a pre-trial motion to suppress the evidence. As the record bears out, defense counsel were only aware that a search had been conducted on March 20th, pursuant to a valid search warrant; that the incident Return and Inventory had been made and filed March 20th; and that the gasoline can had in fact been delivered to the officers by Mrs. Hinchman on March 24th. Clearly, the filing of a pre-trial motion to

suppress under these circumstances would have constituted the filing of a frivolous and groundless motion; it is felt that a pre-trial motion to suppress could not have been filed without doing violence to defense counsel's professional responsibility to refrain from filing groundless or spurious motions. As pointed out by Mr. Justice Erickson in his dissenting opinion, the express provisions of Rule 41(e), Colorado Rules of Criminal Procedure, authorize the filing of such motions when the accused first become aware of the grounds for his motions.

The court in its holding further states that "It is to be inferred from the court's (trial court's) ruling that it determined that the motion was not timely because no evidence had been seized in the second search". In this regard it is felt that the Honorable Supreme Court of Colorado misconceived applicable facts for as previously submitted, it is surely the law that the "capturing" of intangible evidence, *i.e.*, the capturing of the "potentially relevant evidence" consisting of gas fumes or vapors, constitutes a seizure. See *e.g., Berger v. New York, supra.*

II

THE COURT'S IMPOSED LIMITATIONS ON PETITIONER'S CROSS-EXAMINATION OF THE CHIEF PROSECUTION WITNESS AGAINST HIM, BASED ON THE ASSERTED STATE'S INTEREST IN PRESERVING THE CONFIDENTIALITY ATTENDANT TO JUVENILE DELINQUENCY PROCEEDINGS, DEPRIVED PETITIONER OF A MEANINGFUL CONFRONTATION OF THE WITNESSES AGAINST HIM, IN CONTRAVENTION OF HIS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS.

The conviction of petitioner is based essentially on

the testimony of the prosecution's chief witness, Bobby Abrahamson, Jr. As Justice Erickson stated in his dissenting opinion, "...young Abrahamson's testimony is the lynchpin of the prosecutor's case..." and "...His accusations provide by far the greatest part of the evidence which speaks for conviction...". His testimony was to the effect that he had set the fire but that petitioner had hired him to do so. The evidence further established that upon being visited in jail and questioned twice by petitioner's estranged wife as to whether her husband had anything to do with setting the fire, he denied any knowledge of the fire. He was similarly twice visited and questioned by Agent Cline and Chief Hunter, and both times denied any knowledge relating to the fire. It was only after he was offered a favorable plea bargain, conditioned on his implicating the petitioner, that he did so. Just four months prior to the fire, young Mr. Abrahamson had been involved in a felony murder prosecution, which culminated in his being given very favorable consideration in similar plea bargaining in exchange for his testimony implicating his accomplices in the murder. Yet, at the trial, although said witness' motives for testifying were clearly at issue, the trial court sustained the prosecuting attorney's in-camera request prior to his testimony, that the said witness not be cross-examined concerning the nature of the plea bargain and the benefits thereof received by him in the felony murder case because the witness had been adjudicated as a juvenile delinquent in the matter. The Court, relying on a provision of the Colorado Childrens Code, which provides to the effect that juvenile delinquency proceedings are to be held as confidential and not the subject of inquiry in collateral proceedings, (See Section 19-1-109, Colorado

Revised Statutes, 1973 as amended, supra), upheld the prosecution's request and limited defense counsel's cross-examination on that issue to the asking of the bare question "whether sometime in the past he (the witness) had been in trouble with the law and received favorable treatment in exchange for his agreement to testifying against others" (ff. 1083; 1099-1100). As in the case of *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed. 2d 347 (1974), where the Supreme Court of Alaska had erroneously concluded and held that since defense counsel had been permitted to ask the witness "whether he was biased", it is felt that the Honorable Supreme Court of Colorado likewise erroneously concluded and held that the asking of the bare question "whether sometime in the past he (the witness) had been in trouble with the law and received favorable treatment in exchange for his agreement to testify against others" was sufficient to afford petitioner his Right of Confrontation.

it is submitted that, as this Court expressly held in the case of *Davis v. Alaska, supra*, which is essentially on all fours with the instant situation, the state's interest in protecting the confidentiality attendant to juvenile delinquency proceedings must give way to the more paramount interest, an accused's right to confront the witnesses against him. The Honorable Colorado Supreme Court, it is urged, has omitted and ignored the previous pronouncement of this Court in *Davis v. Alaska, supra*, and such omission serves to deprive petitioner of his liberty without due process of law.

III

THE STATE'S REQUEST THAT AN ASSERTED ERRONEOUS SENTENCE IMPOSED AGAINST PETITIONER BE NULLIFIED AND A GREATER

SENTENCE IMPOSED, WHEN SUCH A REQUEST WAS MADE ONLY AFTER THE PETITIONER HAD PERFECTED HIS APPEAL, CONSTITUTES SUCH INTERFERENCE WITH PETITIONER'S RIGHT OF APPEAL AS TO DEPRIVE HIM OF HIS RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

It is felt that the Honorable Supreme Court of Colorado misapprehended applicable law in remanding the case for resentencing of the petitioner. the sentence imposed upon petitioner, being for a term of not less than five nor more than six years, with three years suspended off the minimum and maximum, effectively imposes an incarceration of not less than two nor more than three years, whereas the penalty for the offense for which the defendant stands convicted, first degree arson, being a Class 3 felony under applicable Colorado law, provides for a sentence of not less than five nor more than forty years. (See Section 18-1-105, Colorado Revised Statutes, 1973 as amended.) The Court in its opinion holds that the sentence thus imposed upon petitioner and partially suspended by the trial court constitutes an invasion of the legislature's province to determine punishment for crime.

The record reflects that: (1) petitioner was thus sentenced by the trial court on August 5, 1976 (f. 290); (2) petitioner thereafter filed his requisite Notice of Appeal with the trial court on August 25, 1976, with a true copy thereof having been served upon counsel for the prosecution on August 27, 1976 (ff. 265-269); (3) on September 1, 1976, petitioner filed with the trial court his requisite Statement of Issues on Appeal as well as his requisite Designation of Record on Appeal, ((ff.270-280), and, both of which were duly served upon counsel for the prosecution on September 1, 1976 (ff.276 and 280); (4) subsequently, petitioner docketed his

appeal in the Colorado Court of Appeals on October 5, 1976, and thereafter filed his Opening Brief on February 10, 1977. Never during all of the abovestated times was any claim of error in its imposition of sentence ever asserted by the prosecution before the trial court. Likewise, no appeal or cross-appeal was ever filed by the prosecution in the Colorado Court of Appeals. In their "Answer Brief" filed with the Colorado Court of Appeals on March 14, 1977, the prosecution for the first time, by way of argument in their brief, raised the claim that the sentence imposed upon petitioner was "illegally low" and ought to be revised.

The Colorado Court of Appeals, by a split decision, hereto appended as Appendix "C", held that the state's failure to file a cross-appeal was fatal to its challenge of the sentence imposed against petitioner. And, relying on the principles enunciated by this Court in the case of *Blackledge v. Perry*, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed. 628 (1974), further reasoned that:

> "...judicial standards of fairness reaching constitutional proportions do not permit procedures which effectively deter a defendant from exercising his rights of appeal. Here, given the people's failure to apprise the trial court of its alleged error and the lack of notice to defendant of the intended attack on his sentence, the observance of such standards becomes crucial." (See Colorado Court of Appeals Opinion appended as Appendix "C".)

Clearly, the claimed error in sentencing of petitioner was never asserted by the state until after petitioner had perfected the appeal of his conviction, and even then the matter was not raised by any cross-appeal as might have been pursuant to sanctions of Colorado law. It is

felt that the claimed error in sentence in this case would never have been raised but for the fact that petitioner appealed his conviction.

It is submitted that the state's silence until after the complete perfection of petitioner's appeal, leads to an inference that the state's belated request to the Colorado Court of Appeals to order the correction of the claimed erroneous sentence, whether intentional or inintentional, is effectively an act of retaliation against the petitioner for having asserted his right of appeal. Such retaliation by the state against a person exercising his right of appeal is violative of the due process clause of the Fourteenth Amendment. See *e.g., North Carolina v. Pearce,* 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969).

CONCLUSION

WHEREFORE, for the foregoing reasons, petitioner respectfully prays this Honorable Court to issue its Writ of Certiorari to review the judgment and opinion to the Supreme Court of the State of Colorado.

Respectfully submitted,

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Appendix "A"
IN THE SUPREME COURT OF THE
STATE OF COLORADO
NO. C-1409

THE PEOPLE OF THE STATE
OF COLORADO,
Petitioners,
v.
JOSEPH EDWIN HINCHMAN,
Respondent. December 11, 1978
NO. C-1414
JOSEPH EDWIN HINCHMAN,
Petitioner,
v.
THE PEOPLE OF THE STATE
OF COLORADO,
Respondents.

Certiorari to the Colorado Court of Appeals

EN BANC — JUDGMENT AFFIRMED IN PART, REVERSED IN PART AND REMANDED WITH DIRECTIONS

J.D. MacFarlane, Attorney General
David W. Robbins, Deputy Attorney General
Edward G. Donovan, Solicitor General
James S. Russell, Assistant Attorney General

Attorneys for The People
Joe Clarence Medina
Charles F. Murray
Attorneys for Joseph Edwin Hinchman

MR. JUSTICE GROVES delivered the opinion of the Court.

The defendant and the People separately requested certiorari from the Colorado Court of Appeals' opinion in *People v. Hinchman,* ____ Colo. App. ____ , 574 P.2d 866. We granted both petitions and consolidated the matters. We affirm in part and reverse in part.

The defendant, Joseph Hinchman, was convicted of first-degree arson and conspiracy to commit arson. At trial, the district court denied his motion to suppress as evidence a gasoline container which was observed during a search of the defendant's home on March 20, 1975. The validity of that search is not contested. Officers seized other gasoline containers but unwittingly left behind the container at issue. Two officers returned to the defendant's home on March 21, 1975 and sealed the remaining container. Approximately four days later, at the suggestion of the police, the defendant's wife voluntarily brought the can to the police. The fact of the second entry was not communicated to counsel for the defense during pretrial discovery.

The People introduced at trial expert testimony relating to fuel and vapors obtained from the can. Defense counsel then moved to have the evidence concerning vapors and fuel in the can suppressed. The trial court concluded that the defendant knew the sources of the relevant evidence prior to trial and should have made a motion to suppress at that time. *It is to be inferred from the court's ruling that it determined that the motion was not timely because no evidence had been seized in the second search.* The court of appeals affirmed this ruling.

We agree that no evidence was seized during the officers' second entry.[1] The officers simply acted to preserve potentially relevant evidence which the defendant's wife later surrendered voluntarily. The record does not show that analysis of the container's contents would not have been possible but for the policemen's actions in sealing the opening. the defendant's claim that evidence was illegally seized as a result of the second visit cannot be sustained.

The second issue on appeal concerns the limitation placed by the trial court upon the defense counsel's cross-examination of Bobby Abrahamson, Jr., the chief witness for the prosecution. Abrahamson initially was charged with first-degree arson. The prosecutor offered to reduce charges against him in return for his testimony against the defendant. The court permitted cross-examination concerning the plea bargain.

Abrahamson also had been involved in a separate homicide for which he was charged as an accessory to felony-murder. The prosecutor in that case agreed to treat Abrahamson's participation as a juvenile offense if he would testify against the principals, which he did. At the time of the arson, Abrahamson was awaiting sentencing to the reformatory at Buena Vista.

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[1] Consequently, the recent opinion in *Michigan v. Tyler,* ____ U.S. ____, 98 S.Ct. 1942, 56 L.Ed. 2d 486 (1978), is not dispositive. In *Michigan v. Tyler* evidence was seized in a series of searches conducted subsequent to the initial search. The initial search was proper by reason of exigent circumstances and the plain view doctrine. *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed.2d 564 (1971).

The defendant sought to question Abrahamson about his role in the felony-murder and the plea bargain struck in that case. The district court ruled that evidence of the juvenile adjudication was not admissible, but that the defendant could show that the witness previously had received favorable treatment in return for testifying for the prosecution. The court of appeals concluded that the trial court had acted within its discretionary powers to determine the scope of cross-examination.

The defendant relies upon *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974) and *People v. King*, 179 Colo. 94, 498 P.2d 1142 (1972) in arguing that the policy against introduction of juvenile dispositions in subsequent proceedings should have given way before the defendant's sixth amendment right to confront adverse witnesses. The relevant portion of the Juvenile Code says:

> "No adjudication, disposition, or evidence given in proceedings brought under section 19-1-104 shall be admissible against a child in any criminal or other action or proceeding, except in subsequent proceedings, under section 19-1-104 concerning the same child." Section 19-1-109 (2), C.R.S. 1973.

Without addressing the extent of the restrictions the statute imposes, we find the trial court's accommodation of the competing interests in this case appropriate and within the bounds of its discretion to determine the scope of cross-examination. *Davis v. Alaska, supra*, held that cross-examination about the witness' juvenile court record and probation status was necessary to afford the defendant his right of confrontation. However, the witness was on probation for burglary, the same offense with which the defendant in that case was

charged. Cross-examination was necessary to reveal that the defendant "might have been subject to undue pressure from the police and made his identification under fear of possible probation revocation." The same potential for bias was not present in this case. Abrahamson's punishment for the previous juvenile offense was not connected to the conviction in this case. Since cross-examination as to previous plea bargaining was allowed, the jury was able to consider Abrahamson's credibility in light of his history of bargaining for leniency in return for testimony.

In *People v. King, supra*, an informant testified against the defendant who was charged with the possession and sale of narcotic drugs. The court ruled that cross-examination regarding pending charges against the informant for possession and sale of illegal drugs should have been allowed. Again, as in *Davis v. Alaska, supra*, it was necessary so that the jury could be apprised of the informant's motives. Hidden motives are not at issue in the instant case. Neither the status of pending charges nor other prosecutions depended upon Abrahamson's testimony against the defendant.

The facts here do not establish a conflict between the defendant's right of confrontation and the policy against use of juvenile adjudications or pending charges for purposes of impeachment. The jury was permitted to assess the defendant's credibility in the light of both plea bargains. No evidence of bias or interest of the witness was kept from it. Under the facts of this case, we conclude that the defendant was not denied his right to confront adverse witnesses.

The final issue presented by this case is whether the district court had power to suspend a portion of the defendant's sentence. The defendant was convicted of

first degree arson which is a class three felony, section 18-4-102, C.R.S. 1973, and punishable by a prison term of five to 40 years, section 18-1-105, C.R.S. 1973. The court first imposed a sentence of five to six years, then suspended three years of the minimum and maximum. The resulting sentence was for two to three years' imprisonment. Since the court of appeals held the People could not raise the issue for the first time on appeal, the court did not reach the merits of the claim that the trial court lacked jurisdiction to suspend the sentence so as to reduce it below the statutory minimum.

As we have recently noted in *People v. Henderson* Supreme Court No. C-1426, _____ Colo. _____, _____ P.2d _____ announced November 6, 1978, the alleged defect in the sentence is jurisdictional and, therefore, may be raised for the first time upon appeal.

Section 16-11-304, C.R.S. 1973 explicitly states the power of judges to sentence for offenses such as that here involved:

> "When a person has been convicted of a ...class 3 felony, the court imposing the sentence...shall establish a maximum and a minimum term for which said convict may be imprisoned. The maximum term shall not be longer than the longest term fixed by law...and the minimum term shall not be less than the shortest term fixed by law for the punishment of the offense of which he was convicted."[2]

[2] The same scope of sentencing power is indicated by section 16-11-101, C.R.S. 1973 (Supp. 1976):

"In...class 3 felonies, the defendant may be sentenced to imprisonment for a period of time within the minimum and maximum sentence authorized for the class of offense of which the defendant was convicted."

It is the legislature's prerogative to define crimes and prescribe punishments. *People v. Arellano*, 185 Colo. 280, 524 P.2d 305 (1974); *People v. Stark*, 157 Colo. 59, 400 P.2d 923 (1965). Since the General Assembly explicitly has limited sentencing discretion regarding class 3 felonies, the courts have no jurisdiction to sentence inconsistently with the minimum and maximum terms specified by statute. *People v. Pauldino*, 187 Colo. 61, 528 P.2d 742 (1972) *People v. Jenkins*, 180 Colo. 35, 501 P.2d 742 (1972); *People v. Jones*, 176 Colo. 61, 489 P.2d 596 (1971).

Nor may the court circumvent legislative dictates by first sentencing within legislatively prescribed parameters, and then suspending a portion of the minimum and maximum. The result is the invasion of the legislature's exclusive province to set punishments.

Accordingly, we reverse as to the trial court's sentencing jurisdiction and affirm with respect to the motion to suppress and the scope of cross-examination. We return the case to the court of appeals for remand to the district court with directions that it proceed in accordance with the views expressed herein.

MR. JUSTICE ERICKSON and MR. JUSTICE CARRIGAN dissent.

NO. C-1409 **PEOPLE v. HINCHMAN**
NO. C-1414 **HINCHMAN v. PEOPLE**

MR. JUSTICE ERICKSON dissenting:

I respectfully dissent. In my opinion, the majority has misapprehended the significance of the facts of this case and misconstrued the applicable law.

Defendant's conviction rests largely on the testimony of Bobby Abrahamson, Jr. Although there is other evidence corrobative of defendant's guilt, young Abrahamson's testimony is the lynchpin of the prosecution's case. He testified that defendant had hired him to set fire to the offices of a local attorney and that before the fire he went to defendant's garage and picked up the red and yellow gasoline can which became the object of defendant's suppression motion. He futher testified that, after he set the fire, he returned the can to the garage. The gasoline can contained vapors which provided the basis for expert testimony on behalf of the prosecution.

About four months before the fire, Abrahamson was implicated in a felony-murder. He later consummated a plea bargain, in which the district attorney agreed to prosecute him as a juvenile offender. Less than three weeks before he set the fire, Abrahamson was granted immunity from further prosecution for the murder in return for his testimony against his co-participants in the murder.

Abrahamson was later arrested for setting the fire and charged with first degree arson. He maintained his innocence until the police (acting with the authority of the same district attorney's office which had made the felony-murder plea bargain with Abrahamson) offered to reduce the charge against him to second-degree arson and assured him that any sentence he received

would run concurrently with the sentence he had received for the murder.He then told police that the defendant hired him to set the fire. As a result of that identification, defendant was arrested, and a search warrant issued for a search of his home and garage.

Exhibit "T," the gas can in question, has a history that is significant to the issues in this case. Exhibit "T" is a two and one-half gallon red and yellow gasoline can. No can of that description appears in either the search warrant or the inventory returned after the search warrant was executed. It was not seized in the first search of defendant's garage on March 20, 1975. Chief Hunter, the officer who conducted that search, testified that although he saw the can in the garage on March 20, he forgot to take it with him.

On the night of March 21, Chief Hunter returned to the defendant's garage and sealed the lid of the can with tape to prevent any gasoline vapors that might be in the can from escaping. He conceded that the warrant authorizing the search was executed on March 20, and that a return was made. He also conceded that he embarked on his nighttime search of the defendant's premises without a warrant. Although he sealed the can, he deliberately left it in the garage. Defendant did not discover the second, illegal entry until he was able to cross-examine Chief Hunter at the time of the trial.

On March 24, Chief Hunter contacted defendant's estranged wife. As a result of their conversation, Mrs. Hinchman obtained the red and yellow gasoline can from the garage and delivered it to him. Mrs. Hinchman testified that she was positive that the red and yellow gas can was not in the garage on the morning of March 21, and that she was surprised to see it when she returned on March 24. Although defendant

was aware that Mrs. Hinchman had brought the gasoline can to Chief Hunter, he did not learn until cross-examination was commenced that his wife's actions were the result of police promptings.

I.

At trial, the district judge denied defendant's motion to suppress evidence relating to the gasoline can, on the ground that the motion was not timely filed. Crim. P. 41(e)(5), entitled "Motion for Return of Property and to Suppress Evidence," provides in part:

> "The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the court where the trial is to be had. *The motion shall be made and heard before trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion*, but the court, in its discretion, may entertain the motion at the trial." (Emphasis supplied.)

The majority states that "It is to be inferred from the court's ruling that it determined that the motion was not timely because no evidence had been seized in the second search." The record reflects that the district judge did not address himself to the question, whether taping the can to prevent the escape of gasoline fumes was or was not a seizure. Instead, his ruling appears to be based on his conviction that, since defendant knew before trial that the gasoline can would be introduced as evidence, any motion relating to its suppression should have been made before trial. The approach of the trial judge violates Crim. P. 41(e)(5), which

provides that a motion to suppress is timely if it is made when the defendant becomes aware of grounds for his motion.

Chief Hunter testified that he taped the gasoline can to prevent fumes from escaping. It is a reasonable conclusion that taping the lid of the can would, indeed, have prevented fumes from escaping. If his actions caused the fumes to remain in the can and to be subject to police testing which resulted in evidence introduced against the defendant, then evidence about those fumes has obviously been "seized." The majority states that Chief Hunter did not seize anything, since he merely "acted to preserve potentially relevant evidence." A trespass to preserve evidence is indistinguishable from a seizure for purposes of the Fourth Amendment. Since the defendant did not know of the trespass until Chief Hunter testified at trial, his motion to suppress was timely.

When police engage in a warrantless search, it is incumbent upon the prosecution to demonstrate that the search fits into one of the narrow exceptions to the general requirement that a warrant be obtained for every search. *People v. Neyra*, 189 Colo. 367, 540 P.2d 1077 (1975); *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). The same burden must be borne if the prosecution wishes to prove that a warrantless search has not violated a defendant's Fourth Amendment rights because no seizure resulted.

Finally, since the seizure was made long after any justification existed for a warrantless invasion of defendant's home, the evidence was seized in a "stale search," and subject to suppression once a proper motion was made. *Mincey v. Arizona*, ___ U.S. ___,

98 S.Ct. 23, 54 L.Ed.2d 56 (1977); *Michigan v. Tyler*, ____ *U.S.* ____, 98 S.Ct. 1942, 56 L.Ed.2 486 (1978).

II.

The trial court's other error resulted from its curtailment of defendant's cross-examination of Bobby Abrahamson, Jr. The trial court's ruling violated defendant's right "to be confronted with the witnesses against him..." *U.S. Const.*, Amend. VI.

The crucial part which Abrahamson played in the prosecution's case has been outlined above. His accusations provide by far the greatest part of the evidence which speaks for conviction. Defendant's defense of the charge against him rested to a large degree on his ability to persuade the jury that Abrahamson was not telling the truth. Had the jury doubted Abrahamson's story, defendant's acquittal would have likely followed.

Defendant wanted to inquire into Abrahamson's adjudication in the felony-murder. That inquiry could have borne two fruits: (1) evidence of Abrahamson's involvement would have cast a shadow on his general credibility; (2) defendant could logically have argued that the felony-murder plea agreement was the beginning of a series of understandings between Abrahamson and the prosecution that ended in Abrahamson implicating the defendant.

Contrary to the majority's suggestion, the trial court did not limit cross-examination because the inquiry was not relevant to the case. The relevance of the proposed line of questioning is obvious. Instead, the trial court relied on section 19-1-109 (2), C.R.S. 1973:

> "*19-1-109. Effect of proceedings.* (1) No adjudication or disposition in proceedings under section 19-1-104 shall impose any civil disability upon a child or disqualify him from any state personnel system or military service application or appointment or from holding public office.
>
> (2) No adjudication, disposition, or evidence given in proceedings brought under section 19-1-104 shall be admissible against a child in any criminal or other action or proceeding, except in subsequent proceedings under section 19-1-104 concerning the same child."

The trial court found, and the majority seems to assume, that this statute foreclosed defendant's inquiry into Abrahamson's felony-murder adjudication, since the witness had been prosecuted as a juvenile. Even assuming that the statute will bear the interpretation given it, the state's interest in preserving the confidentiality of juvenile proceedings and in helping juvenile offenders achieve rehabilitation in an atmosphere free from notoriety must fall before the defendant's paramount right to defend himself. *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

The majority relies on the fact that in *Davis v. Alaska, supra*, the witness was on probation for a prior offense when he testified. It draws from this fact the conclusion that a state policy protecting juveniles must supersede a defendant's right to confront witnesses, unless the state is "holding a club" over the witness at the time he testifies. But that is not the *ratio decidendi* of *Davis v. Alaska, supra*. Rather, the opinion in that case is a refutation of the majority's decision:

> " 'The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had

except by the direct and personal putting of questions and obtaining immediate answers.' Wigmore, Evidence § 1395, p. 123 (3d ed. 1940).

"Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, *i.e.*, discredit, the witness. One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness. By so doing the cross-examiner intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony. The introduction of evidence of a prior crime is thus a general attack on the credibility of the witness. A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand....

....

"(T)o make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. Petitioner was thus denied the right of effective cross-examination which "would be constitutional error of the first magnitude and no

amount of showing of want of prejudice would cure it." *Brookhart v. Janis*, 384 U.S. 1,3.' *Smith v. Illinois,* 390 U.S. 129, 131 (1968)." *Davis v. Alaska, supra*, 415 U.S. 316, 318.

See also People v. Taylor, 190 Colo. 210, 545 P.2d 703, 705 (1976); *People v. Crawford*, 191 Colo. 504, 553 P.2d 827, 829 (1976); Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases,* 91 Harv. L.Rev.567, 580-81 (1978).

In this case, evidence of the witness' prior adjudication was important not only to cast general doubt on his credibility, but to show that his accusations against defendant did not arise in a vacuum. Defendant should have been allowed to argue that Abrahamson's identification was part and parcel of a series of bargains he made with the district attorney's office. The majority appears to feel that defendant's right to confrontation was satisfied because he was allowed to elicit from the witness an admission that he had previously engaged in plea bargaining. That previous bargain could have been the result of an offense no more serious than a traffic ticket. Such a general admission was insufficient to put the jury on notice that Abrahamson's bargain stemmed from charges that he had been involved in committing a murder. Murder was the only crime for which the state could impose the death penalty. *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977); *cf., People v. District* Court, ____ Colo. ___ , ___ P.2d ___ (Supreme Court No. 27963, announced October 23, 1978). It would be a reasonable inference that Abrahamson appreciated favorable treatment. We need not speculate to conclude that the jury could have taken this information into account when it weighed

Abrahamson's credibility.

A state may protect juveniles and further their rehabilitation by preserving the confidentiality of juvenile proceedings. *Cf., Oklahoma Publishing Co. v. District Court,* 430 U.S. 308, 97 S.Ct. 1045, 51 L.Ed. 2d 355 (1977). But *Davis v. Alaska, supra* makes it clear that the state may not force a defendant to pay all the costs attendant upon enforcing that policy:

> "The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness. The State could have protected Green from exposure of his juvenile adjudication in these circumstances by refraining from using him to make out its case; the State cannot, consistent with the right of confrontation, require the petitioner to bear the full burden of vindicating the State's interest in the secrecy of juvenile criminal records." *Davis v. Alaska, supra,* at 320.

Accordingly, I would remand the proceeding for a new trial, with orders to conduct a hearing to determine whether there would have been evidence of fumes in the can if the police had not taped it shut, and to allow the defendant to question the witness about his prior adjudication relating to the felony-murder.

MR. JUSTICE CARRIGAN joins me in this dissent.

Appendix "B"

IN THE SUPREME COURT OF THE STATE OF COLORADO

THE PEOPLE OF THE
STATE OF COLORADO,
Petitioner,
C-1409 vs.
JOSEPH EDWIN HINCHMAN,
Respondent.
JOSEPH EDWIN HINCHMAN,
Petitioner,
C-1414 vs.
THE PEOPLE OF THE
STATE OF COLORADO,
Respondent

CERTIORARI
TO THE COURT
OF APPEALS

Upon consideration of the Petition for Rehearing filed by Joseph Edwin Hinchman in the above cause, and now being sufficiently advised in the premises,

It is this day ordered that said Petition be, and the same hereby is, denied.

BY THE COURT, EN BANC JANUARY 8, 1979.

MR. JUSTICE ERICKSON and MR. JUSTICE CARRIGAN would grant.

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Appendix "C"

COLORADO COURT OF APPEALS
NO. 76-697

PEOPLE OF THE STATE
OF COLORADO,
Plaintiff-Appellee,
v.
JOSEPH EDWIN HINCHMAN,
Defendant-Appellant.

Appeal from the District Court
of Jefferson County

Honorable Winston W. Wolvington, Judge

Division I
Opinion by JUDGE COYTE JUDGMENT AFFIRMED
BERMAN, J., concurs.
Kelly, J., concurs in part
and dissents in part.

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The defendant, Joseph Edwin Hinchman, appeals his conviction on charges of first degree arson and conspiracy to commit arson. And, for the first time in the prosecution, the People now seek to attack the sentence imposed against defendant. We affirm the judgment.

I.

Defendant first contends that the trial court erred in denying defendant's motion, made during the trial, to suppress as evidence a gasoline can discovered at defendant's residence. There was no error.

Pursuant to a valid warrant, police officers searched defendant's home on March 20, 1975. The officers located and seized several gasoline containers, including the can in question. However, even though the item was listed in their return and inventory, the officers inadvertently left the container behind on the premises.

Becoming aware that the container was missing, the officers returned to defendant's home on the following day and placed tape over the mouth of the can to prevent any vapors therein from escaping. Subsequently, on March 24, defendant's then-estranged wife and a joint owner of the property visited the residence and observed the container in the garage. Mrs. Hinchman testified at trial that during a telephone conversation with one of the police investigators, she inquired of the officer why the gasoline can was still located in the garage and was informed that the police had mistakenly failed to transport it with the other items seized. Mrs. Hinchman stated that she thereupon volunteered to deliver the container to the officers, and later did so.

Although defendant did not move to suppress the container until the trial was in progress, the trial court

in its discretion permitted defendant to argue the motion. *See People v. Stevens*, 183 Colo. 399, 517 P.2d 1336 (1973). Following an *in camera* hearing, the trial court found that defendant and his counsel were aware prior to trial of the means by which the police had obtained the container and, consequently, that the motion was not timely filed.

Defendant now maintains that regardless of his knowledge of Mrs. Hinchman's role in producing the evidence, neither he nor his attorneys were informed of the officer's second visit to, and allegedly illegal search of, his home on March 21. Thus, defendant concludes, he was not aware of the grounds for his motion prior to the officer's testimony at trial, *see* Crim P. 41(e)(5), and that therefore the court erred in finding that the motion was not timely filed. This argument is not persuasive.

The initial search of defendant's home was conducted with a valid warrant, and the knowledge concerning the container acquired by the officers during that search was not impermissibly tainted under the doctrine of *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). *See People v. Orf*, 172 Colo. 253, 472 P.2d 123 (1970). Actual seizure of the container was accomplished through Mrs. Hinchman's voluntary relinquishment of the item. And, in view of Mrs. Hinchman's proprietary interest in the premises, her agreement to surrender the evidence resulted in no infringement of defendant's constitutional rights. *See United States v. Matlock*, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974); *Langford v. People*, 176 Colo. 109, 489 P.2d 210 (1971).

Accordingly, even if the officers' second visit were deemed illegal, that intrusion produced no evidence

which was used against defendant and could not have provided grounds upon which to grant the motion for suppression. Under these circumstances, defendant possessed prior to trial all pertinent information relative to the seizure of the container and its possible suppression, and the trial court consequently did not abuse its discretion in declaring the motion untimely. *See Morgan v. People*, 166 Colo. 451, 444 P.2d 386 (1968); *see also Wainwright v. Sykes*, ____ U.S. ____, ____ S.Ct. ____, ____ L.Ed.2d ___ (Announced June 23, 1977).

II

Defendant next asserts that the trial court erred in limiting his cross-examination of the People's chief witness. We disagree.

The prosecution witness, who had been involved in a previous juvenile delinquency adjudication, testified that defendant had offered him $200 to burn the offices of one Russel Gummin. The witness recounted at length his conversations with defendant, the means by which he gained access to the building and started the fire, and his motives for testifying against defendant, which included a plea bargain in the instant case. He also admitted that he had burglarized the offices before burning them, that he had used drugs on the day of the incident, and that he fled the scene of the crime in an automobile which he had stolen several days previously.

With respect to the witness' past adjudication, the trial court ruled *in camera* that impeachment on this basis would be limited to establishing that the witness had been charged with previous offenses and that he had in that prosecution received certain favorable treatment in return for his testimony against the other defendants.

Relying on *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 345 (1974) and *People v. King*, 179 Colo. 94, 498 P.2d 1142 (1972), defendant argues that he was entitled to impeach the witness by detailed examination concerning the earlier adjudication, including the nature of the offense, the date of the adjudication, and the precise terms of the plea bargain. Neither decision advanced by defendant mandates such a result.

Davis v. Alaska, Supra, does not confer a right in every case to impeach the general credibility of a witness through cross-examination about his past delinquency adjudications, *see* concurring opinion of Stewart, J.; *see also People v. Robles*, 183 Colo. 4, 514 P.2d 630 (1973), but rather it requires only that an adequate inquiry into the bias and motivation of a witness be permitted. Here, in contrast to the circumstances present in *Davis*, defense counsel was permitted to explore fully the witness' motives for testifying, which examination satisfied the rights of confrontation enunciated in both *Davis* and in *People v. King, supra.*

In connection with general impeachment designed to show a witness' lack of credibility through his prior crimes, broad latitude is to be afforded the cross-examiner. However, the scope and limits of such cross-examination are within the sound discretion of the trial court. *People v. Crawford,* ____ Colo. ____, 553 P.2d 827 (1976).

Here, the witness recited numerous violations of the law for which he had been neither charged nor convicted. He admitted his participation in the arson and also stated that he had been involved in a previous adjudication resulting in a plea bargain. Given that testimony, the trial court did not abuse its discretion in precluding an even more extensive inquiry into the

witness' criminal background.

III

Without cross-appeal, the People here attempt to challence the propriety of defendant's sentence, which was suspended in part by the trial court. We decline to consider the matter.

Generally, in the absence of a cross-appeal, an appellee may not raise on review alleged errors on the trial court. *Newt Olson Lumber Co. v. School District No. 8*, 83 Colo. 272, 263 P. 723 (1928). An exception to the rule is recognized when the appellee asserts arguments in support of his judgment which would not increase his rights under the judgment. *City of Delta v. Thompson,* ____ Colo. App. ____, 548 P.2d 1292 (1975). In the context of a criminal proceeding, principles of due process demand, at a minimum, that an attempt by the prosecution to enlarge an appellant's sentence conform to these established procedural requisites.

Appeals by the prosecution are permitted in this state pursuant to statute. Section 16-12-202, C.R.S. 1973; *see also Krutka v. Spinuzzi*, 153 Colo. 115, 384 P.2d 928 (1963). But, §16-12-202 must be interpreted consistently with applicable rules of procedure and judicial precedent indicative of the legislative intent underlying the statute. *See People v. Stevens,* 183 Colo. 399, 517 P.2d 1336 (1973).

The People argue that C.A.R. 4(c)(2)(I) and *People v. Renfrow,* ____ Colo. ____, ____ (No. 26948, May 2 1977), established the proposition that review of the propriety of a sentence is an adjunct of the appeal, even when the matter has not been raised. However, the situation here concerning an attempted enlargement of defendant's sentence is to be distinguished from the circumstances contemplated

in the Rule, which is specifically limited to appeals by a defendant, and from the situation in *Renfrow* where a reduced sentence was ordered.

In addition, judicial standards of fairness reaching constitutional proportions do not permit procedures which effectively deter a defendant from exercising his rights to appeal. Here, given the People's failure to apprise the trial court of its alleged error and the lack of notice to defendant of the intended attack on his sentence, the observance of such standards becomes crucial.

The United States Supreme Court has on numerous occasions addressed the due process considerations arising from the possibility of a criminal defendant's receiving an increased sentence as a consequence of his appeal. In the most recent and definitive treatment of the question, the Court stated:

> "The lesson that emerges from (past cases) is that the due process clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of 'vindictivenes.' "

Blackledge v Perry, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed2d 628 (1974). The decision further explains that the requisite "vindictiveness" is not necessarily evidenced by bad faith on the part of the prosecution, but can also be manifested through circumstances which indicate that the state is engaged in retaliation against the defendant.

While the precise facts of *Blackledge* are distinguishable from those presented in this case, the Court's rationale is not. *See also - ABA, Standards Relating to criminal Appeals* §2.3 (c)(iii). We therefore conclude that neither C.A.R. 4 (c) nor any other authority permits the attack on defendant's sentence

attempted by the prosecution in this case. Rather, we hold that the People's failure to file a cross-appeal was fatal to any further challenge to the sentence, and, accordingly, we do not reach the merits of that issue.

The judgment is affirmed.

JUDGE BERMAN concurs.

JUDGE KELLY concurs in part and dissents in part.

JUDGE KELLY concurring in part, dissenting in part.

I respectfully dissent from that part of the majority opinion which declines consideration of the People's challenge of the propriety of the defendant's sentence for arson.

After his convictions for first degree arson and conspiracy, the defendant was sentenced to a term of not less than five nor more than six years on the arson charge and to an indeterminate to three-year term for conspiracy in accordance with §18-1-105,C.R.S. 1973. The trial court then unconditionally suspended three years from the maximum and minimum limits of the arson sentence.

On appeal, the Attorney General contends that the suspension effectively reduced the arson sentence to a term of from two to three years, in contravention of §16-11-304, C.R.S. 1973, and §18-1-105, C.R.S. 1973, which provide that the minimum penalty for a class 3 felonies is five years. I agree. In my view, the trial court exceeded its jurisdiction in suspending a portion of the defendant's sentence without placing him on probation, *cf. People v. Ray*, ____ Colo.____, 560 P.2d 74 (1977), thereby allowing him to serve a lesser term than that prescribed by the legislature.

I.

We are confronted with constitutional limits on the

judiciary in imposing sentence on a violator of the criminal law. Implicit in our tripartite system of government is the maxim that no branch of government may exercise the governmental powers reserved to another, just as one branch may not confer upon a second branch powers reserved to the third. *People v. Herrera*, 183 Colo. 155, 516 P.2d 626 (1973). Such an encroachment upon the powers of coordinate branches of government is constitutionally prohibited. *Colo. Const.*, Art. III. Where the legislature has delineated maximum and minimum terms of confinement, the trial court may exercise its discretion in sentencing the defendant only within the statutory limits. *People v. Pauldino*, 187 Colo. 61, 528 P.2d 384 (1974); *People v. Jenkins*, 180 Colo. 35, 501 P.2d 742 (1972); *People v. Jones*, 176 Colo. 61, 489 P.2d 596 (1971).

The Supreme Court has often recognized the legislature's exclusive power to define crimes and to prescribe punishment. *People v. Arellano*, 185 Colo. 280, 524 P.2d 305 (1974); *People v. Stark*, 157 Colo. 59, 400 P.2d 923 (1965). The legislature's preeminence in this field precludes judicial interference with legislative sentence determinations. *Walker v. People*, 126 Colo. 135, 248 P.2d 287 (1952). Unless the punishment provided by the legislature can be regarded as cruel or unusual, the courts are obligated to defer to the General Assembly's judgment. *Bland v. People*, 32 Colo. 319, 76 P.359 (1904).

Consequently, courts are bound by § 16-11-304, C.R.S. 1973:

> (1) When a person has been convicted of a class 2 or class 3 felony, the court imposing the sentence...shall establish a maximum and a minimum term for which said convict may be imprisoned. The maximum term shall not be longer than the longest term fixed by law for the punishment of the offense of which he was convicted, and the minimum term shall not be less than the shortest term fixed by law for the punishment of the offense of which he was convicted." *See also* Crim P. 32(b)(2)(II).

Accordingly, I regard the trial court's suspension of the defendant's sentence as an unconstitutional invasion of the exclusive province of the legislative branch.[1]

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[1]An additional violation of the doctrine of separation of powers arises under the provisions of Article IV, Section 7 of the Colorado Constitution, which reserves to the governor exclusive authority to grant reprieves, commutations, and pardons to convicted violators of the law. *People v. Herrera, supra*. Where, as here, a trial court, in effect, sentences a defendant to a punishment lighter than that established by a legislature, it has invaded the provinces of each of the other branches of government. Such mitigation of sentence not only usurps the legislative prerogative of defining punishments, but also invades the executive's privilege of commuting sentences of convicted offenders. *Colo. Const., Art. Sec. 7; People v. Herrera, supra, supra; see also People v. Simms*, 136 Colo. 447, 528 P.2d 228 (1974); *People v. Davis*, 186 Colo. 186, 526 P.2d 312 (1974); *People v. Fulmer*, 185 Colo. 366, 524 P.2d 606 (1974); *People v. Johnson*, 185 Colo. 285, 523 P.2d 1403 (1974).

II.

Based on the foregoing analysis, I must conclude that the majority has mistakenly determined that this issue can be reviewed only if the People raise it on cross-appeal. We are faced with a jurisdictional question, not merely a potential error of law, and jurisdictional defects may be raised at any point in the proceeding by any party or by the court *sua sponte. Peaker v. Southeastern Colorado Water Conservancy District,* 174 Colo. 210, 483 P.2d 232 (1971); *Triebelhorn v. Turzanski,* 149 Colo. 558, 370 P.2d 757 (1962); *Julian v. People,* 67 Colo. 152, 196 P. 714 (1919). Since sentences imposed in excess of the court's authority are void, *see Serra v. Camron,* 133 Colo. 115, 292 P.2d 340 (1956); *People ex rel. Carroll v. District Court,* 106 Colo.89, 101 P.2d 26 (1940); *In re Nottingham,* 84 Colo. 123, 205 P.2d 794 (1928), the People have raised a jurisdictional question and no notice of cross-appeal was required. *See* C.A.R. 1(d); Crim. P. 12(b)(2).

While this question has not been explicitly addressed in Colorado, the history of several of our appellate decisions supports the conclusion that cross-appeal is not prerequisite to our consideration of questions of jurisdictional and constitutional magnitude. In *People v. Herrera, supra, the defendant* appealed the trial court's refusal to reconsider his sentence in light of lesser penalties prescribed by the then recently enacted Criminal Code. The People, at oral argument, suggested that retroactive application of the more lenient sentence schedule would conflict with the governor's exclusive right of commutation, in violation of the separation of powers provision of Article III of the Colorado Constitution, with the result that the Supreme Court declared the statute in

question unconstitutional.

A recent case, *People v. Mankowsky,* 187 Colo. 145, 529 P.2d 314 (1974), is substantially similar to the present case. There, after the defendant's conviction and sentence became final, he petitioned for a reduction of sentence in accordance with the reduced penalties of the Criminal Code. The trial court did penalties of the Criminal Code. The trial court did reduce the defendant's sentence, but only slightly, and the defendant appealed the reduction on the ground that he was denied a fair hearing before the trial court. The Attorney General argued, without cross-appeal, that the case was controlled by *People v. Herrera, supra,* and the Supreme Court agreed:

> "The Attorney-General points out that under *Herrera*, the reduction of sentence was a nullity and we agree. Since the Court had no jurisdiction to enter the order it did, the modifying sentence must be set aside, and the cause remanded for reinstatement of the earlier sentence in a proceeding at which the defendant is present." *People v. Mankowsky, supra.*

The People in this case seek no more than was ordered in *Mankowsky*. I see no obstacle to granting the relief requested, especially when the failure to do so results in judicial usurpation of legislative and executive authority.

Here, the initial sentence is not invalidated by the void attempt at suspension. *In re Nottingham, supra.* I would vacate the trial court's order of suspension and would remand the case for the issuance of a mittimus in accordance with the trial court's valid sentence on the arson charge, *Serra, V. Cameron, supra; People ex rel. Carroll v. District Court, supra; People v. Patrick,* ____ Colo. App. ____ , 555 P.2d 182 (1976). However,

the Attorney General's argument that the conspiracy sentence is also invalid overlooks the applicable amendment of the relevent statutes, see §§ 18-1-105 and 18-2-206, C.R.S. 1973 (1976 Cum. Supp.), and that sentence should therefore be affirmed.

APPENDIX "D"

Section 19-1-104(1)(a) and 4(a) and (b), Colorado Revised Statutes, 1973 as amended. Jurisdiction.

(1) Except as otherwise provided by law, the juvenile court shall have exclusive original jurisdiction in proceedings:

(a) Concerning any delinquent child, as defined in section 19-1-103(2) and (9), but concerning a delinquent child as defined in section 19-1-103(9)(c), the court may refuse to accept jurisdiction in the case;...

(4)(a) When a petition filed in juvenile court alleges a child fourteen years of age or older to be a delinquent child as defined in section 19-1-103(9), by virtue of having committed an act which would constitute a felony if committed by an adult, and if, after investigation and a hearing, the juvenile court finds it would be contrary to the best interest of the child or of the public to retain jurisdiction, it may enter an order certifying the child to be held for criminal proceedings in the district court. The hearing required in this subsection (4) shall be held pursuant to the provisions of sections 19-1-107 and 19-3-108.

(b) A child may be charged with the commission of a felony only after the hearing as provided in paragraph (a) of this subsection (4), or when the child is:

(I) alleged to have committed a crime of violence defined by section 18-1-105, C.R.S. 1973, as a class 1 felony, and is fourteen years of age or older; or

(II) alleged to have committed a crime defined

by section 18-1-105, C.R.S. 1973, as a class 2 or a class 3 felony, or a non classified felony punishable by a maximum punishment of life imprisonment or death, except those felonies defined by section 18-3-401(1)(d) and 18-3-403(1)(d), C.R.S. 1973, and is sixteen years of age or older, and the child has been adjudicated a delinquent child within the previous two years and the act for which the child was adjudicated a delinquent would have constituted a felony if committed by an adult; or

(III) alleged to have committed a felony subsequent to any other felony which is the subject of proceedings under section 19-3-108 resulting in waiver of jurisdiction by any juvenile court in this state.